83 - 1696
No.

In The
Supreme Court of the United States
October Term, 1983

VINCENT PITEO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does the affirmative finding of uncharged criminal conduct at a sentencing hearing which results in the enhancement of punishment, constitute former jeopardy thereby precluding a subsequent prosecution and cumulative punishment for the identical criminal conduct?

THE PARTIES BELOW

Petitioner by superseding indictment was added to the original indictment filed in the United States District Court for the Southern District of New York naming as defendants Benjamin Ruggiero, Nicholas Santora, Anthony Rabito, Antonio Tomasulo, John Cerasani, James Episcopia, Joseph Messina, Dennis Mulligan, and Dominick "Sonny Black" Napolitano for alleged violations under 18 U.S.C. §§1962(c) and (d), and 21 U.S.C. §§812, 841 and 846.[1]

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[1] Defendants Ruggiero, Santora, Rabito, Tomasulo and Cerasini were jointly tried before the Honorable Robert W. Sweet and a jury. At trial Cerasini was acquitted of all charges. Ruggiero was convicted of the RICO conspiracy and acquitted of the RICO substantive charge. Santora was convicted of RICO charges and the narcotics conspiracy, but acquitted of the narcotics substantive count. Rabito was acquitted on the RICO conspiracy but convicted on both narcotics counts. Tomasula was convicted of the RICO conspiracy. Upon appeal the judgment against Tomasula on the RICO conspiracy was reversed and remanded with a direction to dismiss that count of the indictment. The RICO conspiracy conviction of Santora was reversed and remanded for a new trial. The remaining judgments were affirmed.

None of the remaining five defendants were tried. Episcopia's trial was severed. An order of *nolle prosequi* was entered against Mulligan by the government. Messina and Napolitano did not appear for trial. Vincent Piteo pled guilty to a two-count information charging violations under 18 U.S.C. §§371, 2314 and 2315.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AMENDMENTS

STATUTES

IN THE
SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Vincent Piteo ("Piteo") petitions for a Writ of *Certiorari* to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of conviction entered in the United States District Court for the Southern District of New York.

ORDERS BELOW

A subsequently published *per curiam* opinion was issued by the United States Court of Appeals for the Second Circuit on January 18, 1984. In that opinion the Court of Appeals affirmed the judgment of the United States District Court for the Southern District

of New York. *United States v. Piteo*, 726 F.2d 53 (1984). The opinion of the Court of Appeals is set forth in the Appendix at page 1a.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction of the District Court was dated and entered on January 18, 1984.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

28 U.S.C. §1254

§1254. Courts of appeals; *certiorari* appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Under a twice-superseded, four-count indictment, petitioner along with nine others was charged with a conspiracy to engage in a pattern of racketeering activity, 18 U.S.C. §1962(d) (count 1) and with a substantive racketeering offense, 18 U.S.C. § 1962(c) (count 2). Two remaining counts alleged a second conspiracy whose object was distribution of a Schedule II controlled substance, methaqualone, 21 U.S.C. §846 (count 4) and a substantive offense of possession with intent to distribute methaqualone, 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) (count 3).

On July 7, 1982, following the District Court's denial of petitioner's pre-trial motion to dismiss the prosecution upon double-jeopardy grounds,[1] petitioner waived prosecution by indictment and pled guilty to an Information charging two non-RICO conspiracies whose objects were interstate transportation of stolen property valued in excess of $5,000.00 taken from the apartment of the sister of the Shah of Iran (count 1) and receipt and disposal of a truckload of cases of tuna fish from interstate commerce, also valued in excess of $5,000,000 (count 2). On November 15, 1982, Judge Sweet sentenced petitioner to two

[1] The relevant portion of the District Court's opinion, denying petitioner's motion is set forth in the Appendix at page 6a.

concurrent four-year terms of imprisonment, to run consecutively to a three-year sentence imposed by the Hon. Kevin T. Duffy in an earlier case.

Petitioner took a direct appeal to the Court of Appeals, in which he asserted this double-jeopardy claim.[3] It is and was petitioner's contention that the acts for which he was indicted in this case were the identical acts about which an unindicted co-conspirator, Raymond Wean, testified in great detail during a *Fatico* hearing[4] in petitioner's earlier case before the Hon. Kevin T. Duffy. In that prior case,[5] petitioner had been found guilty, by a jury, of a conspiracy to receive and dispose of items of stolen property as well as a substantive offense of receipt and disposal of stolen merchandise.[6] Upon sentencing the petitioner in the former case, Judge Duffy explicitly and unequivocally stated on the record:

> ... this Fatico hearing weighed heavily on my mind, at least some of it ... The interesting thing about Wean's testimony though, a couple of things, the association with people from organized crime, of course I have to be influenced by that. The fact that it was going on all the time is very impressive ... The tuna fish caper, basically Wean was complaining that

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[3] Petitioner's guilty plea raises no issue of waiver of his double jeopardy claim in light of *Menna v. New York*, 423 U.S. 61 (1975).

[4] *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978); *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979), cert. denied 444 U.S. 1073 (1980).

[5] (S) 80 Cr. 587 (K.T.D.); Docket Number 82-1108; Supreme Court No. 83-1404, *cert. denied*, (March 26, 1984).

[6] The property in that case was different from and unrelated to the property in this case.

he got stiffed . . . Vincent Charles Piteo also got stiffed . . . I am convinced that this was not a one-time thing . . .[3]

On March 25, 1982, a mere three days after Vincent Piteo was sentenced before Judge Duffy, the Government filed the first superseding indictment[4] in the instant case. This indictment charged petitioner with the identical acts the government had already fully presented to Judge Duffy through the testimony of Wean and which were clearly considered by the Court at sentencing. This new indictment, the ensuing conviction and an additional consecutive sentence, clearly comprised the government's second shot at petitioner for the very same conduct for which he had already been sentenced by Judge Duffy.

Upon review of petitioner's argument that, in such circumstances, he was placed twice in jeopardy for the same offense in contravention of the Fifth Amendment, the Court of Appeals by *per curiam* opinion, affirmed petitioner's judgment of conviction.

REASONS FOR GRANTING THE WRIT

To be punished twice for the same offense is indisputably an infringement of the Double Jeopardy Clause of the Constitution.[5] *Ex parte Lange*, 18 Wall

[3] Although Judge Duffy only referred to the tuna fish incident, during the *Fatico* hearing, Wean also testified extensively about the aborted robbery attempt at the home of the sister of the Shah of Iran.

[4] The first indictment which did not name Piteo, was filed on November 23, 1981.

[5] ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " U.S.C.A. Const. Amend. V.

163 (1874), *North Carolina v. Pearce*, 395 U.S. 711 (1969), *United States v. DiFrancesco*, 449 U.S. 117 (1980). However, based upon the mistaken belief that evidence of uncharged criminal conduct introduced at a convicted defendant's sentencing is analagous to the introduction of evidence of a defendant's prior convictions, as a result of the Second Circuit's decision in this case, prosecutors will now be permitted to employ "the use of unadjudicated criminal conduct to enhance punishment for another crime . . . [without the court's] prohibit[ing] the subsequent adjudication and punishment of that conduct."[10]

With this view receiving the imprimatur of several Circuit Courts of Appeals, the government is being given free reign, unfettered by impartial review, to decide whether any particular defendant has been punished sufficiently. If the government unilaterally determines that this particular individual is deserving of greater punishment, it will indict anew, based upon the identical offense which the first sentencing judge considered, in imposing what that judge deemed to be the appropriate punishment for that defendant.

There is no constitutional justification for allowing the government to get "two bites of the sample apple." Where the government affirmatively seeks to enhance a sentence, as it did here, through testimony illicited at a *Fatico*[11] hearing, and is successful, it

[10] Government's brief on appeal at p. 18.

[11] "The sentencing proceeding utilized herein is known in the Second Circuit as a *Fatico* hearing. *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978), *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Similar sentencing hearings are conducted by the other circuits which only serve to escalate the proportions of this dilemma. See, *United States v.*

should not be permitted to obviate the guarantees of the Double Jeopardy Clause by prosecuting anew based upon the exact crimes considered by the original sentencing judge. It may choose one or the other—not both.

Although there have been an abundance of decisions upholding the constitutional validity of enhancing a defendant's sentence based upon his *prior* convictions, *United States v. Tucker*, 404 U.S. 443 (1972), *Williams v. New York*, 337 U.S. 241 (1949), *Williams v. Oklahoma*, 358 U.S. 576 (1959), *United States v. Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975), that determination is not comparable to enhancing a defendant's sentence based upon *uncharged* and, hence, as yet unadjudicated allegations of criminal conduct. Although there is no dispute that a court may consider unadjudicated criminal conduct at sentencing, such conduct *should only be utilized once* for the purpose of sentence enhancement.

In the instance of prior convictions, the sentencing court is merely given the opportunity to enhance a defendant's penalty because he has not learned from his past mistakes, and he has not been rehabilitated. Providing this type of information at sentence is not an affront to the principles of double jeopardy because the defendant is not being twice punished for the same offense. The judge is simply being given relevant data concerning a convicted defendant so that he may exercise his wide discretion appropriately. Thus, when

Tracey, 675 F.2d 433 (1st Cir. 1982), *United States v. Ammirato*, 670 F.2d 552 (5th Cir. 1982), *United States v. Ray*, 683 F.2d 1116 (7th Cir. 1982), *United States v. Baylin*, 696 F.2d 1030 (3rd Cir. 1982), *United States v. Stevenson*, 573 F.2d 1105 (9th Cir. 1978).

past convictions are relied upon, the sentencing court is not giving weight to uncharged and, hence, unproven allegations.

Where, however, as here, the Court enhances punishment due to such uncharged allegations of separate misconduct, the sentencing judge is not so much interpreting these untested allegations as illustrative of the defendant's lack of rehabilitation, as he is actually adjudicating newly alleged transgressions, and thereby imposing punishment thereupon. Consequently, a Court's reliance upon uncharged criminality to enhance punishment *is tantamount to trying, convicting and sentencing the defendant for such conduct. A fortiori,* to later try and punish defendant anew for that same offense constitutes double punishment thereby violating the Double Jeopardy Clause. *Green v. United States,* 355 U.S. 184 (1957).

Clearly analogous is this court's holding that where a defendant has been subjected to a proceeding which may result in an adjudication that he has committed criminal acts, thereby placing his liberty and reputation at risk, he has been put in jeopardy within the meaning of the Fifth Amendment. *Breed v. Jones,* 421 U.S. 519, 529, 537-38 (1975). The *Fatico* proceeding herein, as well as the similar sentencing proceedings utilized by the other Circuits, is undeniably adjudicatory in nature. Indeed, when a court is presented with evidence of uncharged and unadjudicated criminal conduct by the government and thereby enhances the defendant's sentence, the court has made a determination that the defendant has committed criminal acts and has punished him therefore. "Thus, in terms of potential consequences, there is little to distinguish [a] . . . hearing such as was held in

this case from a traditional criminal prosecution" *Breed v Jones, supra* at 530. Hence, following such an "adjudication of guilt," a subsequent prosecution for the identical criminal acts constitutes double jeopardy.

This exact issue, the affirmative use of identical offenses in order to exact two distinct punishments, has been addressed in recent Circuit Court decisions and yet the issue remains both unsettling and unsettled. The Fourth Circuit, in *United States v. Wise,* 603 F.2d 1101 (1979), affirmed a perjury conviction which earlier had been the basis for enhanced punishment of defendant's drug offense. The court, in holding that no double jeopardy problems arose, relied on the mistaken belief that an enhanced penalty based upon unproven offenses is analogous to enhanced punishment premised upon prior convictions.

The Ninth Circuit in *United States v. Van Moos,* 660 F.2d 748 (1981), tangentially reached the question. There, the court reversed a District Court order which had held that a defendant could not be punished upon a perjury charge where an earlier court had considered that perjury in forming defendant's earlier sentence, without offending double jeopardy principles. The *Van Moos* decision, however, relied primarily upon the very narrow ground that in order for jeopardy to attach, a defendant must actually commence serving his sentence which, in that case, had not occurred. The Ninth Circuit also cited *Wise, supra,* approvingly.

In contrast with the above-mentioned decisions is the deep concern for the Constitutional protection against double jeopardy enunciated by the Seventh Circuit:

> There is an element of unfairness in allowing the prosecutor to bring an unadmitted and unproven charge to the attention of a sentencing judge; presumably *the decision to dismiss or prosecute that charge will normally depend upon the prosecutor's appraisal of the first punishment as either adequate or inadequate to vindicate the government's interest in disposing of two separate charges. In a practical sense therefore, the prosecutor has two opportunities to use one charge as a basis for imposing what he regards as an adequate sentence. The constitutional protection is intended to forestall such unfairness* and to give a defendant the right to one final disposition of any pending charge. (emphasis supplied)

United States v. Haygood, 502 F.2d 166, 169 (7th Cir. 1974), *cert. denied* 419 U.S. 1114 (1975).[12]

Even the Second Circuit, despite the affirmance in the instant case, evinces an internal degree of uncertainty with respect to this vexing issue. In *United States v. Hansen*, 701 F.2d 1078 (2d Cir. 1983) the court implied that courts should not enhance a defendant's punishment for acts upon which he may be punished later, following an appropriate adjudication of guilt. In determining the propriety of enhanced punishment premised upon acts concerning which a defendant may never be convicted due to the insanity defense, the court pointed to examples where "the law

[12] Were the court to grant the petition for *certiorari*, we would respectfully submit that the ultimate result adverse to that appellant which was reached in *Haygood* could not be reached in the instant case because the facts therein are readily distinguishable. In *Haygood* the defendant never objected to the first sentencing court's consideration of the other pending charge. In sharp contrast, in the instant case, by seeking a *Fatico* hearing before Judge Duffy, petitioner plainly objected to and sought to impeach the collateral information which the government attempted to prove.

permits enhancement of punishment for conduct that could *not* be the basis of a valid conviction." *Hansen* at 1082-1083 (emphasis supplied). Inconsistently, therefore, *there*, unlike in the instant case, the court seemed to approve enhanced punishment based upon unproven charges *only* where the defendant was incapable of being prosecuted upon them, but not where the defendant lacked the requisite mental state to be legally responsible for his conduct.

The sparcity of case law on this compelling issue no doubt results from the government's general policy not to prosecute anew for offenses which have been relied upon by a sentencing court in enhancing punishment upon an unrelated offense. In light of the extreme gravity of the issue, however, were *certiorari* granted in this case, petitioner would seek to convince the court to require the judiciary to adopt a practice similar to the Wisconsin "read in" procedure which has been suggested by the Seventh Circuit. *See, United States v. Haygood, supra.* This mechanism allows the accused and the prosecutor to enter into an agreement whereby the sentencing judge may consider uncharged offenses on the condition that the accused will not be prosecuted for such conduct.[13]

All things considered, therefore, since the concept of a *Fatico* hearing, as well as similar types of adjudicatory procedures (*e.g., Breed v. Jones, supra*) bear all the hallmarks of punishment-enhancement vehicles, and since their usage is widespread, it is

[13] Notably, this procedure, not to be prosecuted for an uncharged offense upon which a sentencing judge has relied, is the prevailing practice in England and is even advocated by the Model Penal Code § 7.05 (4), *Haygood, supra* at 170.

respectfully submitted that the court is constrained to determine whether they place defendants in former jeopardy with respect to further prosecutions based on the identical evidence, if not the same criminal transactions *Blockburger v. United States,* 283 U.S. 299 (1932); *Ashe v. Swenson,* 397 U.S. 436 (1970) (Brennon, J., concurring).

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT VINCENT PITEO'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

Dated: New York, New York
April 13, 1984

Respectfully submitted,

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APPENDIX "A"
DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED JANUARY 18, 1984

August Term 1982
Argued: April 26, 1983
Decided January 18, 1984
Docket No. 82-1397

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

VINCENT PITEO,

Defendant-Appellant.

Before:
NEWMAN and PRATT, *Circuit Judges,*
and METZNER, *District Judge.**

Appeal on double jeopardy grounds from a judgment of conviction entered on a plea of guilty to a two-count information.

Affirmed.

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* District Judge of the Southern District of New York, sitting by designation.

GERARD E. LYNCH, New York, New York, Assistant United States Attorney for the Southern District of New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Barbara Jones, Assistant United States Attorney, of Counsel), *for Plaintiff-Appellee.*

BARRY I. SLOTNICK, New York, New York (Roger J. Schwarz, New York, New York, of Counsel), *for Defendant-Appellant.*

PER CURIAM:

Vincent Piteo appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, following his plea of guilty pursuant to a negotiated plea agreement. Piteo pled guilty to a two-count information that charged him with conspiracy to transport stolen goods in violation of 18 U.S.C. §2314 and conspiracy to receive stolen goods in violation of 18 U.S.C. §2315. Piteo claims that because the government had introduced evidence of the same two crimes at a *Fatico* hearing, *see United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978); *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980), in an unrelated matter, his prosecution was barred by the double jeopardy clause of the fifth amendment. We disagree and affirm the conviction.

On March 22, 1982, Piteo was sentenced in the Southern District of New York by Judge Kevin Duffy to three years imprisonment for offenses unrelated to

the present guilty pleas. *United States v. Piteo*, Docket No. CR 80 587 (S.D.N.Y.). Before sentencing, Judge Duffy had conducted a *Fatico* sentencing hearing which revealed, *inter alia*, Piteo's association with the Bonanno organized crime family, his complicity in the theft of a truckload of tuna fish, and his attempted robbery of the apartment of the Shah of Iran's sister. When he imposed sentence, Judge Duffy noted that his decision would "of course * * * be influenced" by Piteo's association with organized crime as shown at the *Fatico* hearing, and that the offense for which Piteo was then convicted "was not a one-time thing." Judge Duffy then sentenced Piteo to concurrent terms of three years' imprisonment.

Three days later the government filed a superseding indictment in this case, adding Piteo as one of ten defendants in a four count indictment following a six year F.B.I. investigation into the activities of the Bonanno organized crime family. The prosecution of five of Piteo's codefendants is described in some detail in our opinion in *United States v. Ruggiero*, Nos. 82-1395, 1396, 1398 and 1399, being filed simultaneously with this opinion. In that prosecution, which was brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c) and 1962(d), Piteo was charged with both substantive and conspiracy RICO crimes which exposed him to a potential sentence of 40 years in prison. The predicate acts charged against him were the theft of the tuna fish and the attempted robbery of the apartment of the Shah of Iran's sister, two of the crimes that were revealed at his earlier *Fatico* hearing.

Piteo negotiated a plea agreement under which he waived indictment and pled guilty before Judge Sweet to the two conspiracy charges, thereby reducing his

maximum exposure to ten years. In return, the government dismissed the RICO indictment against him. Judge Sweet sentenced Piteo on each count to concurrent prison terms of four years, to run consecutively to the three year sentence imposed earlier by Judge Duffy.

Despite his having acknowledged before Judge Sweet that his plea of guilty abandoned all right to appeal, and despite his counsel's acknowledgment that the district court had correctly refused to dismiss the RICO charges on double jeopardy grounds, Piteo now contends on appeal that the charges to which he pled guilty were barred by the double jeopardy clause of the fifth amendment because he had already received from Judge Duffy enhanced punishment based on the same two criminal events. We do not decide whether Piteo's negotiated guilty plea waived his double jeopardy claim, but instead proceed directly to the merits of that claim.

Piteo contends that Judge Duffy's sentence represented "punishment" for the crimes described in the *Fatico* hearing and therefore precludes the government from separately prosecuting him for those crimes. We disagree. The purpose of the *Fatico* hearing before Judge Duffy was not to try Piteo for additional crimes for which he could be punished. Rather, it was to develop information about Piteo that would enable Judge Duffy to determine a proper punishment for the crime of which Piteo then stood convicted. Such evidence is designed to enable the sentencing judge "to gain a fuller assessment of the defendant so that the punishment will 'fit the offender and not merely the crime' for which he was convicted," by shedding "new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' "

United States v. Hansen, 701 F.2d 1078, 1082 (2d Cir. 1983), *quoting North Carolina v. Pearce*, 395 U.S. 711, 723 (1969), *quoting Williams v. New York*, 337 U.S. 241, 245, 247 (1949).

We hold that Piteo's guilty plea to the information charging him with the same offenses that had been presented at the earlier *Fatico* hearing on an unrelated charge did not violate his right to be free of double jeopardy under the fifth amendment. *See United States v. Grayson*, 438 U.S. 41 (1978); *United States v. Wise*, 603 F.2d 1101 (4th Cir. 1979); *United States v. Von Moos*, 660 F. 2d 748 (9th Cir. 1982).

Affirmed.

I concur

s/J.O.N.
9/20/83

I concur

s/C.M.M.
9/23/83

APPENDIX "B"
RELEVANT PORTION OF THE OPINION OF THE UNITED STATES DISTRICT COURT

OPINION

Docket No. 81CR803 (RWS)

UNITED STATES OF AMERICA,

-against-

DOMINICK NAPOLITANO a/k/a "Sonny Black," BENJAMIN RUGGIERO, a/k/a "Lefty," JOSEPH MESSINA, a/k/a "Joey," ANTHONY RABITO, a/k/a "Mr. Fish," NICHOLAS SANTORA, a/k/a "Nicky," JAMES EPISCOPIA, a/k/a "Jimmy Legs," ANTONIO TOMASULO, a/k/a "Boots," JOHN CERASANI, a/k/a "Boobie," DENNIS MULLIGAN, VINCENT LOPEZ and VINCENT PITEO,

Defendants.

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SWEET, D.J.

Numerous motions have been filed by the defendants and the government in this criminal action involving eleven defendants, Dominick Napolitano ("Napolitano"), Benjamin Ruggiero ("Ruggiero"), Joseph Messina ("Messina"), Anthony Rabito ("Rabito"), Nicholas Santora ("Santora"), James Episcopia ("Episcopia"), Antonio Tomasulo ("Tomasulo"), John Cerasani ("Cerasani"), Dennis Mulligan ("Mulligan"), Vincent Lopez ("Lopez") and Vincent Piteo ("Piteo"). The four count indictment charges conspiracy to violate the RICO statute, 18 U.S.C. § 1962(c), substantive violations of the same statute, 18 U.S.C. §1962(d), possession and distribution of quaaludes in violation of 21 U.S.C. §§ 812, 841(a)(1) & 841(b)(1)(A) and 18 U.S.C. § 2, and conspiracy in violation of 21 U.S.C. §846. All defendants have joined in the motions of co-defendants whenever applicable. Each motion will be dealt with separately.

• • •

Double Jeopardy

Additionally, Piteo moves pursuant to Rule 12 Fed. R. Crim. P. to dismiss the indictment on the ground that prosecution is barred by the double jeopardy clause of the Fifth Amendment. The motion is denied.

After Piteo was convicted in 1981 and before he was sentenced by the Honorable Kevin T. Duffy in 1982, a *Fatico* hearing was conducted. Wean testified about Piteo's involvement in the theft of a truckload of tuna fish and an attempted robbery of the apartment of the sister of the Shah of Iran—activities which form the basis of two predicate acts in counts 1 and 2 of the present indictment. Piteo contends that Judge Duffy considered the testimony concerning Piteo's involvement in the theft of tuna fish and the attempted robbery when he imposed sentence and that therefore the trial and possible sentence on counts 1 and 2 of the present indictment relating to the same acts place him in double jeopardy.

The Fifth Amendment guarantee against double jeopardy "protects against a second prosecution for the *same* offense after acquittal, . . . against a second prosecution for the *same* offense after conviction, . . . [and] against multiple punishments for the *same* offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted) (emphasis added). Even if evidence of Piteo's commission of theft and attempted robbery influenced Judge Duffy in his decision to impose sentence, the present RICO prosecution of Piteo is not barred by the double jeopardy clause.

In *United States v. Boylan*, 820 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833 (1939), the Second Circuit held that prosecution and subsequent consecutive sentences for both a RICO offense and the underlying predicate offenses does not violate the double jeopardy clause. "The purpose of RICO was to establish 'new penal prohibitions, and . . . enhanced sanctions and new remedies to deal with the unlawful activities

of those engaged in organized crime.' " *Id. (quoting* Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, *reprinted in* [1970] U.S. Code Cong. & Ad. News, at 1073). In light of this purpose, the Second Circuit concluded that separate convictions and additional sentences were not precluded for a RICO prosecution and an underlying offense. *Id., see United States v. Rone,* 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied,* 445 U.S. 946 (1980).

Thus even assuming that Piteo was sentenced for his involvement in the tuna theft and in the attempted robbery, a conclusion I do not reach, a prosecution alleging a RICO violation having these criminal activities as predicate acts is not barred. Piteo's motion is denied.

APPENDIX "C"
ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES
No. A -706

VINCENT PITEO,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 17, 1984.

s/Thurgood Marshall
Associate Justice of the
Supreme Court of the United States

Dated this 7th
day of March, 1984

END OF DOCKET